In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6757

DAVID X. FONTAINE, PETITIONER,

v.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

	Page
Relevant Docket Entries, United States District Court	1
Relevant Docket Entries, United States Court of Appeals	2
Transcript of Arraignment proceedings, November 13, 1969	3
Transcript of Sentencing proceedings, February 13, 1970	7
Motion under 28 U.S.C. § 2255 to vacate and set aside judgment of conviction, filed August 6, 1971	9
Brief of Law in Support of § 2255 Motion	13
Exhibits to § 2255 Motion	16
Motion to Dismiss motion to vacate sentence, filed October 6, 1971	22
Petitioner's Traverse to Motion to Dismiss filed October 15, 1971	25
Opinion and Order Denying § 2255 Motion, December 7, 1971	30
Petitioner's Assignments of Error on Appeal, filed January 3, 1972	32
Court of Appeals Opinion and Order Affirming Judgment, filed April 21, 1972	34
Order Granting Writ of Certiorari, November 6, 1972	35

Relevant Docket Entries
United States District Court

Date Filed	Filings—Proceedings
1971	
Aug. 6	Motion to vacate sentence with affidavit to proceed in forma pauperis etc., filed.
Aug. 6	Order granting petition to proceed in forma pauperis, filed and entered.
Aug. 6	Proof of mailing filed.
Oct. 6	Govt's motion to dismiss petitioner's motion to vacate sentence with proof of service, filed.
Oct. 15	Petitioner's traverse, filed.
Dec. 7	Opinion and order denying motion to vacate sentence, filed and entered.
Dec. 7	Proof of mailing filed.
Dec. 21	Petitioner's notice of appeal, filed.
Dec. 21	Letter to attorneys re: appeal, filed.
Dec. 21	Proof of mailing filed.
Dec. 27	Order of CCA granting application for leave to proceed in forma pauperis and denying petition for writ of mandamus, filed.
1972	
Jan. 3	Petitioner's pleading re: error and for designation on appeal, filed.

Relevant Docket Entries
United States Court of Appeals
for the Sixth Circuit

Date Filed	Filings—Proceedings
1972	
Jan. 24	*Certified record* (1 vol. pleadings), filed; and cause docketed.
Jan. 31	Appearance of counsel for Appellant.
Feb. 29	Four copies of Brief for Appellant, with proof of service.
Feb. 29	Four copies of Appendix.
Mar. 30	Twenty-five copies of Brief and Appendix for Appellee.
Mar. 30	Proof of service of brief and appendix for Appellee.
Apr. 5	Case submitted on briefs without oral argument (Weick, Edwards and Kent, JJ.).
Apr. 13	Four copies of Reply Brief for Appellant (Copies distributed to the Court).
Apr. 21	Judgment of the District Court affirmed on order without opinion (Weick, Edwards and Kent, JJ.).
May 4	Motion of Appellant to stay the mandate and send record to Supreme Court for certiorari petition.
May 31	Order staying mandate thirty days (Weick, J.).
June 12	Letter from Office of the Solicitor General requesting that the entire certified record be mailed to the Supreme Court (Supreme Court No. 71-6757).

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, VS. DAVID FONTAINE DEFENDANT.	Cr. No. Arraignment

Proceedings had in the above-entitled matter before Honorable Fred W. Kaess, District Judge, at Detroit, Michigan, on Thursday, November 13, 1969.

APPEARANCES:

JOSEPH ZANGLIN, Esq.
(Assistant United States Attorney)

Appearing on behalf of the United States of America

THE CLERK OF THE COURT: The United States of America vs David Fontaine.

MR. ZANGLIN: Your Honor, this is an arraignment on an information charging the defendant with armed bank robbery. He's been given a copy of the Information. He acknowledges that he understands it and knows what the maximum penalty is.

I have explained to him his right to an indictment by a Grand Jury. He has waived that right and signed a waiver of Rights Form.

He understands that he has a right to an attorney at this time and he informs me that he wants to waive that right and has signed a waiver of that right. Knowing all of these rights he informs me that he intends to plead guilty to the information.

THE COURT: You are Mr. David Fontaine?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: You have received a copy of the information here, the charge here against you for armed bank robbery, is that right?

DEFENDANT FONTAINE: Right.

THE COURT: The first thing of consequence is that you have signed also a waiver of Grand Jury indictment which means you are entitled to have this matter first submitted to a Grand Jury and a determination made by that body and an indictment returned first; do your understand that and the rights you have thereunder? Anyway, that's what you will get if you wanted it to go to the Grand Jury.

DEFENDANT FONTAINE: Yes.

THE COURT: You have signed a waiver of that right, am I right?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: In addition, you are entitled to be represented by an attorney and, if you are without funds with which to employ an attorney, the Court will appoint one for you. The Court has here before it a waiver of assignment of an attorney. Is it your wish to proceed here without an attorney?

DEFENDANT FONTAINE: I guess so.

THE COURT: You have got to know so.

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Are you aware of the maximum penalty in this case? Not that you will get it because I don't know nor does anyone else what the penalty will be, but the maximum penalty under your plea if you do plead, is 25 years and/or $10,000.00 fine; do you understand that?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: You understand the maximum penalty?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Knowing all these things, is it your wish then that—are you prepared to plead now?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: How do you plead, sir.

DEFENDANT FONTAINE: Guilty.

THE COURT: With respect to your plea of guilty did anyone made any promise to you of any kind with respect to this matter in order for you to offer your plea of guilty here?

DEFENDANT FONTAINE: No, sir.

THE COURT: No one has threatened you?

DEFENDANT FONTAINE: No, sir.

THE COURT: Do you understand the nature of the charge? Do you know what you are charged with?

DEFENDANT FONTAINE: Yes I know what I am charged with.

THE COURT: What are you charged with?

DEFENDANT FONTAINE: Bank robbery.

THE COURT: Armed

DEFENDANT FONTAINE: Armed bank robbery.

THE COURT: On October 8th?

DEFENDANT FONTAINE: Right. I don't know too much about the law because I have never been in Court before.

THE COURT: I just want to know that you know what you are doing.

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Is it your wish that the Court accept your plea of guilty here to this offense of armed bank robbery?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Did you actually do that?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Did you actually attempt to rob a bank, or did, I guess you did, of some $1,400.00?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Are you knowingly and freely and voluntarily offering your plea of guilty here?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: I want to be sure that you know what you are doing. You are pleading guilty to armed bank robbery occuring on October 8th of the Liberty State Bank in Hamtramck.

DEFENDANT FONTAINE: Yes, sir.

THE COURT: And by the use of a gun, pistol, right?

DEFENDANT FONTAINE: Right.

MR. ZANGLIN: Your Honor, I would suggest that the Court ask the defendant to put on the record some of his own statements concerning the specifics concerning this crime.

THE COURT: What did you do on October 8th?

DEFENDANT FONTAINE: I held the bank up.

THE COURT: What?

DEFENDANT FONTAINE: I held up the teller.

THE COURT: You held up a teller?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Did you take from him some $1,400.00 plus?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Any more?

MR. ZANGLIN: Was anyone with you when you committed this robbery?

THE COURT: He is charged with aiding and abetting Gregory Edward Lee.

MR. ZANGLIN: No, I think Edward Gregory Lee abetted him.

THE COURT: Aided and abetted by Edward Gregory Lee. That's the charge, do you understand that?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Is it your wish that the Court accept your plea?

DEFENDANT FONTAINE: Well, your Honor I wish you would accept my plea on the fact that I have never had a past record. I got strung up on the drugs and I started to make some money.

THE COURT: The Court will accept your plea and refer you to the Probation Department for a pre-sentence report.

MR. ZANGLIN: As to bond, we would recommend a $20,000.00 cash or surety bond.

THE COURT: It may be so ordered.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, vs. DAVID FONTANE DEFENDANT.	Cr. No. 44433

Proceedings had in the above-entitled matter before Honorable Fred W. Kaess, District Judge, at Detroit, Michigan, on Friday, February 13, 1970.

APPEARANCES:

HENRY MAHER, Esq.,
(Assistant United States Attorney)

Appearing on behalf of the United States of America

Detroit, Michigan
Friday, February 13, 1970

CLERK OF THE COURT: Number 44433, United States of America vs David Fontane.

THE COURT: You are Mr. David Fontane, sir?

DEFENDANT FONTANE: Yes, sir.

THE COURT: At the time of your plea you waived the appointment of counsel; is it your wish that you proceed here through sentence without being represented by counsel?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: The maximum sentence in this matter is twenty five years, as you well know. Is there anything you wish to say prior to sentence being imposed upon you.

DEFENDANT FONTANE: Yes, I would like to say I would like to have the mercy of the Court.

THE COURT: Pardon me.

DEFENDANT FONTANE: I was under the influence of drugs when this happened. I would like to have mercy from the Court.

THE COURT: This isn't the time for your plea. How about your habit now?

DEFENDANT FONTANE: Well, I have been in jail five months.

THE COURT: Have you?

DEFENDANT FONTANE: Yes, your Honor. I think I have kicked it already.

THE COURT: You did plead to the charge of armed bank robbery.

DEFENDANT FONTANE: Yes, sir.

THE COURT: The Court takes all these things into consideration.

It is the sentence of this Court that the defendant be placed in the custody of the Attorney General for a period of twenty years under the provisions of Title 18, Section 4208(a) 2.

Are there any other counts on this?

MR. MAHER: No, there aren't, your Honor.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

DAVID X. FONTAINE, MOVANT,

vs.

UNITED STATES OF AMERICA.

Cr. Case No. 44433

ON MOTION TO VACATE AND SET ASIDE JUDGMENT OF CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 44433 UPON THE GROUNDS THAT ALL PROCEEDINGS HERETOFORE ADJUDICATED IN SAID CRIMINAL CAUSE ARE NULL AND VOID AB INITIO AND IN TOTO AS IS ALLOWED AND AUTHORIZED UNDER TITLE 28, U.S.C., SECTION 2255.

MAY IT PLEASE THE COURT:

Movant herein, David Fontaine, in pro se, respectfully moves the Court in the above styled manner and in support thereof submits as follows:

STATEMENT OF THE CASE

On the night of October 21, 1969, movant was awakened from a sound sleep by a loud crash and the frightened screams of his wife and children. Movant noticed a man strugling with his wife and leaped to her rescue. Movant was thereupon clubbed into an unconscious state of mind. Movant was being dragged from his home when he regained consciousness. Movant, while dressed only in his underwear, was tossed into a police vehicle and taken to jail. Movant subsequently learned that the police had, without benefit of a search warrant or probable cause, had broken into his home, clubbed him into an unconscious state and hauled him off to jail, in his underwear, for the purpose of interrogating him. After reaching the police station, movant was handcuffed to a chair and interrogated about several crimes the police said movant had either committed or was involved in. Due to his physical and mental condition at the time of his interrogation movant does not remember very clearly what was said or what was asked of him. His most vivid memory is that one of the interrogation officers was named John Crookshank and that this officer struck movant several times with his fist and open

hands while movant was handcuffed to the chair. Said officer called movant "a nigger bastard" and promised to beat him to death if he didn't co-operate with the police. Movant, while befuddled, groggy, and in mortal fear of his life informed the police that he would say anything they wanted him to say. At the time of the interrogation movant began to bleed rather freely from a gunshotwound he had received a few days prior to his arrest and for which he had been bedridden at the time of his arrest. The brutal treatment administered to him by the arresting officers had torn open the wound which had been healing. Movant blacked out a couple of times during the interrogation but was revived by the police in order that he might answer their questions concerning several crimes they claimed movant had either committed or knew about. Movant, in mortal fear of the officers and suffering from severe pain asked that he be allowed to see a doctor and get some rest. Movant was told by the police that they might let him see a doctor if he co-operated with them and answered their questions but if he didn't co-operate he wasn't going to get anything but a bashed in head. Movant asked if he could call an attorney before being asked any more questions and was slapped in the face by detective Crookshank who informed movant that he was tired of all the stalling and if movant didn't start talking that he (detective Crookshank) was going to "bash his fuckin' head" with a billy club. While in mortal fear that his life was in danger of being forfeited, movant pleaded with the interrogating officers not to kill him and stated that he'd tell them anything he knew and would do whatever they asked of him. Thereafter said interrogating officers *told movant that he had committed numerous crimes and, how he had committed them.* Movant, not wanting to antagonize said officers agreed to anything they asked of him and signed several papers presented to him for his signature. Thereafter movant lost consciousness and when he regained his wits he was being admitted at the Detroit General Hospital. The admission sheets at said hospital reflects that movant was suffering from Heroin addiction, serum hepatitis, gunshot wound in right abdomen, hematoma of the right flank and a convulsive disorder. While in the hospital movant was interviewed and interrogated by state and federal police relative to the crimes and the alleged confessions movant

had made on the night of his arrest. Movant, while ill and mentally disturbed let the police intimidate and coerce him into an agreement to enter a plea of guilty to armed bank robbery. Movant was told that if he did not enter a plea of guilty to the bank robbery charge in federal court that he would be prosecuted in state court and sentenced to life imprisonment. Due to his severe illnesses and mental problems movant allowed the police to convince him that he was a bona fide bank robber and that unless he entered a plea of guilty in federal Court that he would have to stay in the Michigan State Prison for the remainder of his life. Movant was told that he and another man had robbed a teller at the Liberty State Bank in Hamtramack, Michigan of $1,400. Movant, while mentally ill and not in control of his faculties permitted the police to intimidate and coerce him into an agreement to enter a plea of guilty to the robbery of said bank . . . A crime of which movant possesses no knowledge of having ever committed, and a crime to which he was coerced into saying he had committed.

Movant submits that he has a severe mental problem and and that he suffers from epilepsy and a mental trauma of major proportions due to his having been shot in the head by the police when he was a teenager. Movant's fear of the police is such a strong psychological force it motivates his every reaction and destroys his will to resist their desires or commands. Movant holds a constant fear that the police will kill him if he does not obey their every whim or desire and it was this traumatic condition which motivated movant's mental apparatus when he allowed the police to coerce and intimidate him into entering a plea of guilty to a bank robbery. A crime movant did not commit.

Movant submits that following his arrest and arraignment upon the bank robbery charge that he was never before a *U.S. Commissioner* nor had the *advice* of *counsel* at any stage of the proceedings had.

Movant submits that he was beaten by the police for asking if he could talk to an attorney before being interrogated.

Movant submits that the police had conditioned his mind for the proceedings in Court and that he did not understand the consequences of his Constitutional waivers of counsel, Grand Jury and plea of guilty.

Movant submits that he is uneducated (7th grade). That

the legal terms used by the Court were complete jargon to movant and beyond his sphere of comprehension.

Movant submits that he was mentally ill at the time of his arraignment and that his plea of guilty and waiver of Constitutional safeguards was a product of his mental illness.

MOTION NOW MADE

Movant prays that this Honorable Court take judicial cognizance of the exhibits and brief of law annexed hereto and made a part of this proceedings and if not convinced that sufficient grounds exist for nullification of the Constitutional waivers entered in this cause that a plenary hearing be ordered whereby movant will be accorded an opportunity to present evidence and testimony in his behalf; that upon conclusion of such hearing that the Court make a finding of fact and a conclusion of law therefrom; that the judgment of conviction and sentence heretofore imposed in this cause be declared null and void ab initio and in toto. It is so prayed.

Respectfully submitted

this .... day of ....., 1971.

David X. Fontaine
Movant Pro se
Box P.M.B.
Atlanta, Ga. 30315

AFFIDAVIT

I, David X Fontaine, being duly affirmed and under oath, depose and affirm that the allegations of fact set forth in the foregoing motion are truee in all respects.

David X Fontaine
Affiant-Movant

Subscribed and affirmed to before me this 20 day of July, 1971.

Charles C. Moore
Notary Public

BRIEF OF LAW

I

Movant submits that a plea of guilty is more than a confession which admits that an accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment. *KERCHERAL V. UNITED STATES,* 274 U.S. 220.

II

The admissibility of a confession must be based on a reliable determination of the voluntariness of issues which satisfies the Constitutional rights of a defendant. *JACKSON V. DENNO,* 378 U.S. 368.

III

The question of an effective waiver of Federal Constitutional right in a proceeding is governed by federal standards. *CARNLEY V. COCHRAN,* 369 U.S. 506.

IV

Several federal Constitutional rights are involved in a waiver that takes place when a plea of guilty is entered: first is the privilege granted against compulsory self-incrimination guaranteed by the Fifth Amendment, U.S. Constitution; second is right to trial by jury; third is right to confront one's accusers; fourth is the right to indictment by a Grand Jury; and fifth is the right to competent counsel; a waiver of these five important federal rights cannot be presumed from a silent record. *SMITH V. UNITED STATES,* 360 U.S. 1; *BOYKIN V. ALABAMA,* 395 U.S. 238.

ARGUMENT

Movant submits that the arraignment proceedings had in this cause is of no force and effect when reviewed in their proper light. Movant had long been brainwashed, coerced and intimidated into entering his guilty plea before he was arraigned. The in Court formalities conducted by the Court

and Government counsel did not go behind the scene on a search for truth and in failing to do so may have provided a record technically legal upon its face but when said record is perused in the light of the truth such record becomes a mockery of justice.

The admissibility of a confession or a guilty plea induced from a confession obtained under physical and mental duress must be based on a "reliable determination of its voluntary aspects". *JACKSON V. DENNO,* 378 U.S. 368, 387, 84 S.Ct. 1774, 1786, 12 L.Ed. 2d 908.

In *MC CARTHY V. UNITED STATES,* 394 U.S. 459 the Supreme Court held that Rule 11, Fed. R.C.P. was designed to assist trial judges in making the Constitutionally required determination that a defendant's guilty plea is truly voluntary. See, e.g. *MACHIBRODA V. UNITED STATES,* 368 U.S. 487 (1962); *VON MOLTKE V. GILLIES,* 332 U.S. 708 (1948); *WALEY V. JOHNSON,* 316 U.S. 101; *WALKER V. JOHNSON,* 312 U.S. 275; *JOHNSON V. ZERBST,* 304 U.S. 458; cf. *SUNAL V. LARGE,* 332 U.S. 174.

In *Von Moltke,* supra, the Court held:

> "A waiver of the Constitutional right to the assistance of counsel is of no less moment to an accused who must decide whether to plead guilty than to an accused who stands trial." . . . See *WILLIAMS V. KAISER,* 323 U.S. 471, 475.

In the case at bar Movant's plea of guilty and conviction based thereon is the product of fear, coercion and mental illness.

In *BISHOP V. UNITED STATES,* 350 U.S. 961, the Court held that the conviction of a legally incompetent defendant violates due process.

In *PATE V. ROBINSON,* 383 U.S. 375, the Court again held that the fundamental concepts of due process are abused where the mentally ill are criminally prosecuted.

CONCLUSION

Movant submits that due process of law is sorely abused where, as in the case at bar, the police, acting without benefit *of warrant or probable cause,* smash in the doors of a citizens home in the dead of night and brutally assaults

such citizen and his wife, then drags such citizen off to jail in his underwear, cuffs him to a chair, beats him with clubs, blackjacks, kicks him, and tells him that unless he "cooperates" that his head will be bashed in, *denies* such citizen *access* to *legal counsel* . . .

Such tactics used to obtain confessions and criminal admissions are supposedly prohibited in a civilized nation but the conviction dealt with herein was obtained in the foregoing manner should be reversed.

Respectfully submitted

this .... day of ....., 1971.
David X. Fontaine
Movant Pro se

CITY OF DETROIT
JEROME P. CAVANAGH, *Mayor*

DEPARTMENT OF HEALTH
DETROIT GENERAL HOSPITAL
DETROIT, MICHIGAN 48226

DISCHARGE SUMMARY

NAME: David Fontaine
CASE NO.: 686365
SERVICE: Medicine, Ward 6-3
ADMITTED: 12/17/69
DISCHARGED: 1/6/70

FINAL DIAGNOSIS: Heroin addiction.
Serum hepatitis.
Old gunshot wound, right abdomen.
Convulsive disorder.

SECONDARY DIAGNOSIS: Rule out hematoma, right flank.

CHIEF COMPLAINT AND PRESENT ILLNESS: The patient is a 26-year-old negro male who is a prisoner and known heroin addict for the last two years. He came to the hospital because the patient was complaining of dark urine, yellowness in the eyes, anorexia, epigastric discomfort, nausea and vomiting approximately one week prior to admission. The patient has been in the jail for approximately 1½ months and during this period he didn't receive any heroin. Two months prior to admission the patient had a gunshot wound penetrating through the abdominal wall in the right upper quadrant. He has been complaining of right flank pain since then. Past history revealed a gunshot wound in the head in 1962. Since then he continued to have persistent headache and episodes of seizures. The patient was placed on Dilantin and Phenobarbital since then. Three to four days before admission the patient started having

dysuria, supra-pubic tenderness and fever with no chills, and also started having right flank pain.

PHYSICAL EXAMINATION: On admission showed a well-developed, well-nourished negro male, not in distress. Blood pressure 120/75, pulse 80 per minute. HEENT—pupils equal, regular, react to light; fundi within normal limits. Sclerae were icteric. Neck supple; no jugular vein distention. Thyroid not enlarged. Mouth showed gunshot wound hole in the superior palate. There was a scar in the right forehead. Chest—lungs clear to percussion and auscultation. Heart—normal sinus rhythm with no murmur. Abdomen was soft. There was a penetrating gunshot wound through the abdominal wall in the right upper quadrant. There was a fullness and tenderness in the right costovertebral angle. Also some tenderness in the supra-pubic area. Bowel sounds present. Liver, spleen and kidneys were not palpable. Extremities—there was no edema; all peripheral pulses were intact. Neurological examination showed no neurological deficit.

LABORATORY STUDIES: On admission, WBC 6,500, hemoglobin 14 grams %. Reticulocyte count 3.5%. Urinalysis—trace protein, sugar negative, WBC 8 to 16 per high powered field. Alkaline phosphatase less than 4% B. units. LDH 8,750, transaminase SGOT 786, urine culture showed few alpha strep and few staph epidermitis. Colony count less than 1,000. Subsequent urine culture showed no growth. Prothrombin time patient 13.8, control 12.6. Bilirubin was less than 1.2. Initial bilirubin total was 13.4. Bilirubin on 1/5/70, one day before discharge, was 1.4. Electrolytes—sodium 130 mEq/liter, potassium 4 mEq/liter, chloride 94, CO2 24.7. Repeated determination of the enzyme alkaline phosphatase, LDH and SGOT showed progressive lowering in the serum level. Finally the enzymes returned to normal on the day of discharge. Chest x-ray was normal. X-ray of the abdomen was normal. I.V.P. was normal.

HOSPITAL COURSE: The patient during his hospital course showed a smooth recovery and progressive improvement in his general condition. Serial determination of the bilirubin and the enzymes showing progressive lowering in the levels. Finally bilirubin and enzymes SGOT, LDH and alkaline phosphatase became normal before discharge. The

patient has been placed on a course of Ampicillin for urinary tract infection. Finally, patient was discharged in satisfactory condition to be followed in the Medical Clinic. Discharge medications were Multi-vitamins, Dilantin and Phenobarbital for convulsive disorder.

M. M. Al-Rawi, M.D.

W/O/#8
3/3/70

CITY OF DETROIT

JEROME P. CAVANAGH, *Mayor*

DEPARTMENT OF HEALTH
DETROIT GENERAL HOSPITAL
CENTRAL BRANCH
DETROIT, MICHIGAN 48226

DISCHARGE SUMMARY

ADMITTED: 10/21/69
DISCHARGED: 10/26/69

NAME: FONTAINE, David
CASE NO. 686365
SERVICE: Surgical III

FINAL DIAGNOSIS: Hematoma, right lumbar region abdominal wall.
SECONDARY DIAGNOSIS: Two-week-old gunshot wound, abdominal wall.
OPERATIONS PERFORMED: None.

Patient was admitted with a history of pain, right lumbar region with superficial swelling in abdominal wall of two weeks duration. Two weeks ago he had a gunshot wound of abdominal wall after which he developed this painful superficial swelling in the right lumbar region which has not been increasing in size, but the pain has been persistently there. When he came to the Emergency while he had the gunshot wound. At that time (there was) X-ray of the abdomen did not reveal any gas in the abdomen except that there was a small and superficial dense shadow in the right lumbar regional abdominal wall.

PHYSICAL EXAMINATION: Patient does have a very superficial swelling in the abdominal wall in the right lumbar region which is tender, not fluctuant, and extends around the area about 2 inches in diameter around the wound of exit. There is no organomegaly or there is no other tender spot in the abdomen. The rest of system examination of the patient is insignificant and is absolutely normal.

Urinalysis of the patient: Patient does have 3 to 4 RBC's in urine and otherwise the urine is normal. The IVP is normal and patient was put on antibiotics of Procaine Penicillin, 600,000 b.i.d. and Streptomycin, 1 gm. per day for about 5 days and a needle exploration of the area was done under aseptic precautions to find out whether there was any pus in that small superficial swelling. It was negative.

Patient is being discharged in good condition to be followed later on in the Clinic.

M. Gursahani, M.D.

10/28/69
w.o./#12

UNIVERSITY HOSPITAL

1200 West Leonard St.
Pensacola, Florida 32501
(904) 432-7632

January 22, 1971

James Ron Shelley
Public Defender
210 S. Palafox St.
Pensacola, Florida 32501

Re: Hubert Fountain, Jr.—Our file #41995

Dear Sir:

The records on the above mentioned person have been microfilmed, therefore, we will have to give you the information you need in the form of a letter.
He was in our hospital from 11/10/62 to 11/24/62 under the care of Dr. Tippins. Drs. Wolf and Rodewald did the actual surgery. The final Diagnosis was gun shot wound of head, also, 1. Fracture of right cranial bone and maxilla. 2. Fracture of floor of right frontal sinus. 3. Foreign body in right frontal sinus. 4. Depressed skull fracture right frontal area. He was discharged as improved, with a prognosis of good.

Operation: 1. Tracheotomy. 2. Removal of foreign bodies from right frontal sinus. 3. Elevation of deparesed fracture of right frontal sinus. The operative report shows that the gunshot wound entered the head at floor of the mouth and traveled through tongue, roof of mouth, nasal bones and nose and was lodged in frontal sinus.

Past History: Never been hospitalized before.

Present History: This patient was brought to Emergency Room after being shot by Police when trying to avoid arrest.

Hoping this is satisfactory, I am,

Yours truly,
Mrs. J. Leyrer
Medical Records

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID X. FONTANE, PETITIONER, —VS— UNITED STATES OF AMERICA, RESPONDENT.	CIVIL NO. C36898 *MOTION TO DISMISS MOTION TO VACATE SENTENCE*

NOW COMES the United States of America by and through its attorneys Ralph B. Guy, Jr., United States Attorney, and Michael D. Gladstone, Assistant United States Attorney, both for the Eastern District of Michigan, and respectfully states as follows:

FACTS

Petitioner, David Fontane was charged in a one count Indictment with having been aided and abetted by one Gregory Edward Lee in the armed robbery of the Libert State Bank in violation of 18 U.S.C. §2113(d).

Subsequently, on November 13, 1969, petitioner was arraigned and at this proceeding pled guilty to the indictment. Consequently, petitioner was sentenced to be placed in the custody of the Attorney General for a period of Twenty years under the provisions of 18 U.S.C. §4208(a)2.

Petitioner's motion to vacate is essentially based on the claims that he was mentally incompetent to plea and that his plea was involuntary.

ARGUMENT

I. Petitioner was not mentally incompetant when he waived counsel and pleaded guilty.

Petitioner was specifically asked whether he desired court appointed counsel and answered that he wished to proceed without the assistance of counsel. Petitioner alleges that due to a gunshot wound seven years previously this waiver is void as is his plea of guilty.

During the entire arraignment the petitioner failed to mention or even infer any facts pertaining to his mental condition, past medical history, or drug addiction. He did respond to each question asked by the court and admitted he knew what he was doing.

The *Hayes* case requires from a petitioner specific facts regarding the alleged prior mental history or incidents of aberration to support the conclusory allegations. *Hayes v. United States,* 399 F.2d 691 (5th Cir., 1968); See also *Dranow v. United States,* 407 F.2d 47 (8th Cir., 1969); *Sanchez v. United States,* 401 F.2d 771 (2nd Cir., 1968).

A similar fact situation occurred in *Edwards v. United States,* 422 F.2d 788 (7th Cir., 1970). There the defendant, Edwards, after waiving counsel added, "but I would like to talk to somebody that has some maybe psychiatric training. . ." . The court was thereby alerted to this possible defense, and upon further questioning and observation of Edwards decided he was competant to plea.

In this case there is no warning given or incidents of prior aberration nor evidence of medical treatment by a psychiatrist. The medical report from University Hospital states no damage to petitioner's brain and a good prognosis after surgery.

It is respondent's position that petitioner has not borne his burden under the *Hayes* case.

II. Petitioner's plea of guilty was not involuntary.

This claim by petitioner is completely unsupported by the facts alleged. Petitioner covers three pages with unsubstantiated claims of coercion and maltreatment at the hands of the Detroit Police.

But a month after the above confrontation, when he was before the Federal judge not one word was uttered to the presiding judge of any abuse but instead petitioner affirmatively states that there had been no promises made nor had he been threatened.

The case of *Spears v. United States,* 250 F.Supp. 698 (S.D. W. Va. 1966) at page 701 presents the same issue as in this case: who is telling the truth. The Court cited the following rule: "The burden of proof resting upon him and the rules of credibility applying".

It is the government's position that again the burden borne by petitioner has not been satisfied.

Finally, respondent asserts that the requirements of Rule 11, Federal Rules of Criminal Procedure as adjudicated in *McCarthy v. United States,* 394 U.S. 459 (1969) were satisfied by the District Court. Petitioner admitted he understood the nature of the crime and the consequence of his plea on the record.

The petitioner would now two years later have this Court vacate his sentence upon the following record: petitioner voluntarily waived his rights; he asserted his guilt and requested mercy; he briefly described the commission of the crime; remained silent during the arraignment as to any alleged coercion or incompetancy; and declined his right of allocution.

If petitioner were to prevail upon this record then guilty pleas would be a farce and a means whereby an incarcerated felon could obtain a new trial after witnesses were wither dead or unlocatable, memories have faded, and evidence lost or destroyed.

CONCLUSION

It is respectfully prayed that in view of the foregoing this Court will deny and dismiss petitioner's Motion to Vacate Sentence.

Respectfully submitted,

RALPH B. GUY, JR.
United States Attorney

MICHAEL D. GLADSTONE
Assistant U. S. Attorney

Dated: October 6, 1971

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID X. FONTAINE, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

RE: *Civil No. C 36898*

TRAVERSE

Comes now, David X. Fontaine, the petitioner herein, and respectfully submits this Traverse in reply to the respondent's affidavit in opposition (dated Oct. 6, '71, received by petitioner Oct. 10, '71) to petitioner's motion for Sec. 2255 relief in Cr. No. 44433, forwarded to this Honorable Court, dated July 20, '71.

For the purpose of the record, petitioner asks the Court to take note that contrary to respondent's assertion under "Facts" that petitioner pleaded guilty to an indictment, that such assertion is contradicted by the record, to-wit: (pg. 2, Plea Transcript, Nov. 13, 1969):

THE COURT: You have received a copy of the *"information"* here, the charge here against you for armed bank robbery, is that right? (Emphasis mine).

DEFENDANT FONTAINE: Right.

Further examination of said page 2, will show petitioner "waived Grand Jury Indictment."

Petitioner could not competently or intelligently waive his right to counsel since petitioner was never advised by the Court of his *right to a jury trial* and *to be confronted by the witnesses against him;* under the circumstances, petitioner felt that the only function that would be required of counsel, would be to stand beside petitioner while petitioner plead guilty.

That petitioner was never advised of his trial and confrontation rights whereby he could understand the meaningfullness of representation by counsel, is clearly shown by the lack of advice to him in these matters, to-wit: (pgs. 2-3, Plea Transcript, supra):

THE COURT: The first thing of consequence is that you

have signed (sic) also a waiver of Grand Jury indictment which means you are entitled to have this matter first submitted to a Grand Jury and a determination made by that body and an indictment returned first; do you understand that and the rights you have thereunder? Anyway, that's what you will get if you wanted it to go to the Grand Jury.

DEFENDANT FONTAINE: Yes.

THE COURT: You have signed a waiver of that right, am I right?

DEFENDANT FONTAINE: Yes, Sir.

The dialogue between the Court and petitioner clearly shows the latter was not given any understanding by the former as to just what such a waiver encompassed. The failure of the Court to inform petitioner of his basic rights (of trial by jury and confrontation of witnesses) when taking a guilty plea pursuant to *Rule 11, Fed. Rules of Crim. Proc.*, is patently in violation of the mandate under *McCarthy* v. *United States,* 394 U.S. 459, and "automatic prejudice" ensues.

The Court continued its dialogue with petitioner in the following manner (pg. 3, supra):

THE COURT: In addition, you are entitled to be represented by an attorney and, if you are without funds with which to employ an attorney, the Court will appoint one for you. The Court has here before it a waiver of assignment of an attorney. Is it your wish to proceed here without an attorney?

DEFENDANT FONTAINE: I guess so.

THE COURT: You have got to know so.

DEFENDANT FONTAINE: Yes, Sir.

The irony of the whole proceedings aforerecited, is that petitioner was given a handful of "waivers" to sign *BEFORE* the Court made any attempt to advise him in any manner. Thus, as far as petitioner was aware, such waivers were binding on him and any further proceedings were mere formality, especially where, as here in his instant case, no effort was made to inform him that such waivers were not binding if he desired counsel (or trial by jury for that matter).

There is nothing in the record to indicate petitioner's waivers of basic constitutional rights to trial, counsel and confrontation were competently or intelligently taken, and it is axiomatic under American Jurisprudence that for waiver of constitutional rights to be effective, it must clearly be established that there was "an intentional relinquishment or abandonment of a known right or privilege." See, *Johnson* v. *Zerbst*, 304 U.S. 458 (1938); *Brookhart* v. *Janis*, 384 U.S. 1, 86 S.Ct. 1245 (1966). The waiver must be intelligent and competent. See, *Cross* v. *United States*, 325 F.2d 629 (D.C. Cir., 1963).

The respondent claims that:

> "In this case there is no warning given or incidents of prior aberration * * *"

Yet, when we examine page 6, of the Plea Transcript, we find when petitioner tended to explain his circumstances, he stated:

> "I got strong up on drugs * * *"

There should be no argument that a person addicted to drugs is mentally and physically ill and is unable to function in the "norm." Such statement of addiction on petitioner's part was sufficient warning to the Court that petitioner's mental capabilities might well have been impaired, causing him to incompetently waive basic rights and plead guilty to a charge of a 25 year maximum (which the Court readily gave him 20 years of).

Respondent further claims the requirements of Rule 11, *supra*, as adjudicated in *McCarthy*, *supra*, were satisfied; Respondent stating: (quote)——

> "Petitioner admitted he understood the nature of the crime and the consequences of his plea on the records." (unquote)

In view of respondent's assertion, it is necessary to examine the record and see whether petitioner was even advised of the "nature" of the crime, much-less understand it. Hence, we move to page 4, of the Plea Transcript and examine the following dialogue between the Court and petitioner dealing with the "nature of the charge" issue: (quote)——

THE COURT: Do you understand the nature of the charge? Do you know what you are charged with?

DEFENDANT
FONTAINE: Yes, I know what I am charged with.
THE COURT: What are you charged with?
DEFENDANT
FONTAINE: Bank robbery.
THE COURT: Armed.
DEFENDANT
FONTAINE: Armed Bank robbery.
THE COURT: On October 8th.
DEFENDANT
FONTAINE: Right. I don't know too much about the law because I have never been in Court before.
THE COURT: I just what to know that you know what you are doing.

(end of quote)

The gravamen of the offense charged in the information was that petitioner robbed the Liberty State Bank, 930 Joseph Campau, Hamtramack, Michigan, *"the deposits of which were then insured by the Federal Deposit Insurance Corporation."*

Since United States District Courts have no common law jurisdiction in criminal cases, See: *Section 3231, Title 18 U.S.C.A.; Jerome* v. *United States,* 318 U.S. 101, at 106, 107 *United States* v. *Hudson,* 7 Cranch (11 U.S.) 32, 3 L.Ed 259, and *United States* v. *Coolidge,* 1 Wheat. (14 U.S.) 415 4 L.Ed. 124, the "nature" of the charge in petitioner's instant case was not "armed bank robbery," for it is an essential element of an offense under Section 2113, Title 18 U.S.C.A., that the institution robbed be a "bank" as defined in Section 2113 (f). *King* v. *United States,* 426 F.2d 27 (1970), and the term "bank" as applied in Section 2113 (a) is defined in subsection (f) of Section 2113, to include (1) any member bank of the Federal Reserve System, (2) any bank operating under the laws of the United States, and (3) any bank the deposits of which are insured by the Federal Insurance Corporation. See: *Schoepflin* v. *United States,* 391 F.2d 390, 396, note 5 (1968).

At no time, during the pleadings or sentencing proceedings against petitioner, did the Court define the bank in question as being F.D.I.C. insured, nor at any time during said proceedings was any "Organization Certificate" produced, and the lack of such certificate shows a lack of jurisdiction on the part of the Court to accept a guilty plea to

what may not have even been a federal offense, especially where, as here, *no judicial notice was taken by the Court as to the "National Character" of the bank in question.* Compare: *King* v. *United States, supra.*

The "Organization Certificate" goes to the factual basis as well as the jurisdictional basis of whether the offense in question was of a federal nature.

Petitioner respectfully submits, *that the bank in question* in his instant case *did not have a charter number at the time of the alleged robbery, and did not have any as of September 13, 1971,* when upon petitioner's request for same made to the Federal Deposit Insurance Corporation, a search for such Corporation's records *showed NO CHARTER* (ORGANIZATION CERTIFICATE) *for the bank in question—The Liberty State Bank.*

Petitioner can produce documentary proof to such effect, plus additional proof that F.D.I.C. *does not insure against robberies;* such insurance being provided by "private insurance companies."

Under the circumstances of this instant case, petitioner's guilty plea was nothing more than a farce, devoid of due process and Rule 11 safeguards as adjudicated in *McCarthy, supra,* and petitioner is entitled to *McCarthy* relief.

In view of the foregoing, petitioner respectfully prays that the Honorable Court grant the Motion to Vacate.

Respectfully submitted,

David X. Fontaine 27801
Petitioner, pro se

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 36898

OPINION AND ORDER DENYING MOTION TO VACATE SENTENCE

At a session of said court held in the Federal Building in the City of Detroit, Michigan, on the 7th day of December, 1971.

PRESENT: The Honorable FRED W. KAESS, United States District Judge.

The court has before it a motion to vacate sentence filed by David X. Fontaine, an inmate of the United States penitentiary at Atlanta, Georgia. At his arraignment the petitioner pleaded guilty to having been aided and abetted by another in the armed robbery of a bank in violation of Title 18, U.S.C., § 2113(d). As a result, he was sentenced to a term of twenty years in the custory of the Attorney General, pursuant to the provisions of Title 18, U.S.C., § 4208(a)2.

In challenging the validity of his conviction the Petitioner alleges that he was mentally incompetent to plead and that his plea was thus involuntary. The respondent has answered the petition by filing a motion to dismiss.

The petitioner specifically alleges that his plea was the product of fear, mental illness, drug addiction, and coercive police tactics. In addition he contends that he failed to understand the consequences of waiving counsel and pleading guilty. A review of the entire record, however, fails to substantiate these claims. Each time the court offered petitioner the assistance of counsel prior to acceptance of his plea, such offer was declined. It is apparent from the record that petitioner was interrogated on the question of the voluntariness of his plea, that he understood his right to a Grand Jury indictment, that he understood the nature of the charge against him, that no promises were made to him, and that he understood the maximum penalty he could receive. As such, the court clearly conformed to the re-

quirements of Rule 11 of the Federal Rules of Criminal Procedure, as dictated by *McCarthy v. United States,* 394 U.S. 459 (1969), in accepting petitioner's plea as voluntary. When the trial court has so questioned the accused about pleading guilty, the petitioner cannot now be heard to collaterally attack the record and deny what was said in open court. *United States v. Davis,* 319 F.2d 482 (C.A. 6, 1963); *United States v. Orlando,* 327 F.2d 185 (C.A. 6, 1964), cert. denied 379 U.S. 825. Decisions of the United States Supreme Court also reflect this rule. See *Brady v. United States,* 397 U.S. 742 (1970); *McMann v. Richardson,* 397 U.S. 759 (1970). Therefore, petitioner's instant claims are without merit and do not warrant relief.

In view of the foregoing, IT IS ORDERED that the motion to vacate sentence be and the same is hereby DENIED.

FRED N. KAESS
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL No. 36898

TO: CLERK OF COURT:

Comes now David X. Fontaine, in per se, and assigns as error pursuant to Notice of Appeal heretofore filed in this Court from the order of Hon. Fred W. Kaess entered on December 8, 1971, denying Motion to Vacate Conviction pursuant to Title 28 U.S.C. § 2255.

ERROR (ONE)

That the trial Court erred in its arbitrary and capricious denial of fundamental issues of law set forth in defendant-appellant's motion de hors the record.

The contention of the Court that . . . "A review of the entire record, however, fails to substantiate these claims . . ."

Trial Courts may not resort to now existent records to deny material questions of law submitted de hors the records.

In the case sub judice the Trial Court argues that a mentally incompetent is capable of understanding the nature of his charge and all of the intricate legal ramifications surrounding the taking of waivers of Constitutional rights to indictment, counsel, and what constitutes a valid plea of guilty.

The official medical records submitted with defendant-appellant's motion to Vacate clearly and fordefully presents a prima facie cause of action which required the Court to grant a plenary hearing, accord petitioner an opportunity to sustain the burden of proof required to substantiate the material allegations set forth in his motion.

If the contentions of the Court are to be sustained there is no remedy available whereby a mentally ill defendant may collaterally attack an illegal conviction.

ERROR (TWO)

The Court erred in its failure to accord defendant-Appellant an opportunity to be fully and properly heard upon material infringements of constitutional rights which tran-

spired outside the presence of the Court and the Court reporter. This plain error and impermissable as a matter of law.

RECORDS DESIGNATED ON APPEAL

1. Transcript of Arraignment and Sentence.
2. Motion to Vacate Pursuant to Title 28 U.S.C. Section 2255.
3. Governments Motion To Dismiss.
4. Petitioner's Traverse.
5. Order of Court Denying Motion to Vacate.
6. Notice of Appeal.
7. Assignment of Errors.
8. Designation of Records.
9. All Court Minutes.
10. Pre-Sentence Report.
11. All Medical Records Made exhibits with Motion to Vacate under 28 U.S.C. § 2255.

Done this 28th day of Dec., 1971.

/s/ David X. Fontaine 27801-138
Appellant-Defendant
Box P.M.B.
Atlanta, Ga. 30315

No. 72-1060

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID X. FONTAINE, Petitioner-Appellant vs UNITED STATES OF AMERICA, Respondent-Appellee	ORDER

Before WEICK, EDWARDS and KENT, Circuit Judges.

Upon consideration of the appeal, it appearing to the Court that in accepting appellant's plea of guilty to the information charging him with armed bank robbery the District Court fully complied with Rule 11, Fed.R.Crim.P., and determined that his plea was wholly voluntary, that his plea was not made as a result of any threats, and that he was not under the influence of drugs at the time,

It is therefore ORDERED that the judgment of the District Court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT.

JAMES A. HIGGINS
Clerk

SUPREME COURT OF THE UNITED STATES

No. 71-6757

DAVID X. FONTAINE,
PETITIONER,

v.

UNITED STATES

On petition for writ of Certiorari to the United States ..... Court of Appeals for the Sixth ..... Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the pe'ition for writ of certiorari be, and the same is hereby, granted.

NOVEMBER 6, 1972

☆ U.S. Government Printing Office: 1972—489-457/327